

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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Chair
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In the Matter of Tekstar Communications,
Inc.'s Petition to Become an Eligible
Telecommunications Carrier

ISSUE DATE: May 28, 2002

DOCKET NO. P-5542/M-01-1865

ORDER GRANTING CONDITIONAL
APPROVAL AND REQUIRING FURTHER
FILINGS

PROCEDURAL HISTORY

On December 17, 2001 Tekstar Communications, Inc. (Tekstar) filed a petition under the federal Telecommunications Act of 1996¹ (the Act) asking this Commission to designate it an "eligible telecommunications carrier" (ETC) in seven exchanges currently served by Qwest Communications (Qwest). Tekstar asked for the designation to qualify for subsidies from the federal universal service fund, and from any future state universal service fund.

On February 15, 2002, Tekstar asked the Commission to defer consideration of its qualification as an ETC for state universal service fund purposes, pending the development of state universal service rules.

On February 19, 2002, the Minnesota Department of Commerce (the Department) filed comments recommending approval of Tekstar's petition.

This case came before the Commission on April 18, 2002.

FINDINGS AND CONCLUSIONS

I. Historical Background²

The Act is designed to open the nation's telecommunications markets to competition. Its universal service provisions are designed to keep competition from driving rates in rural, insular, and high

¹ Pub. L. No. 104-104, 110 Stat. 56 (codified throughout title 47, United States Code).

²See In the Matter of Minnesota Cellular Corporation's Petition for Designation as an Eligible Telecommunications Carrier, Docket No. P-5695/M-98-1285 ORDER GRANTING PRELIMINARY APPROVAL AND REQUIRING FURTHER FILINGS (October 27, 1999).

cost areas to unaffordable levels by subsidizing them. Only carriers that have been designated ETCs are eligible to receive these subsidies.

Congress realized that competition would force changes in the network of subsidies keeping rural and urban rates comparable. Traditionally, rural rates, which otherwise would have reflected the higher costs of serving rural areas, were subsidized explicitly by payments from federal high-cost funds and implicitly by requiring carriers to average rural and urban costs when setting rates.

Competition called into question the continued viability of subsidizing rural rates through averaged pricing. While no one was sure how competition would develop, many credible scenarios suggested that it would first appear in urban areas, for two reasons: (1) urban areas cost the least to serve, and (2) urban rates are often inflated by rural subsidies, which new entrants without rural customers would not need. Together, these factors made urban markets the logical starting point for new entrants seeking to underprice the incumbents.

This urban-first scenario not only threatened the incumbent carriers and the rural customers, it did not represent the healthy, robust competition the Act envisioned. Congress therefore directed the Federal Communications Commission (FCC) to work with the states to overhaul existing universal service support systems.³

The Act directs the FCC to establish collection mechanisms that are equitable and nondiscriminatory and payment mechanisms that are specific, predictable, and sufficient. It directs the FCC to determine which services qualify for subsidies. And it authorized the states to determine which carriers qualify for universal service funding.⁴ The Act's term for these carriers is "eligible telecommunications carriers."

II. The Legal Standard

Applications for ETC status are governed by federal and state law.⁵ The Act's § 214 requires an ETC to offer certain designated services throughout its ETC-designated service area, use at least some of its own facilities in providing these services, and advertise the availability and price of these services.⁶ While the list of designated services may change over time,⁷ FCC rule § 54.101(a) currently designates the following services:

- voice grade access to the public switched network;
- local usage;
- touch-tone service or its functional equivalent;
- single-party service;

³ 47 U.S.C. § 254.

⁴ 47 U.S.C. § 214 (e).

⁵ 47 U.S.C. §§ 254, 214; 47 C.F.R. § 54.101; Minn. Rules part 7812.1400.

⁶ 47 U.S.C. § 214 (e).

⁷ 47 U.S.C. § 254 (c) (1).

- access to emergency services, including 911 and enhanced 911;
- access to operator services;
- access to interexchange services;
- access to directory assistance;
- toll limitation for qualifying low-income customers.

In addition, state law requires that each grant of ETC status be consistent with the public interest, convenience and necessity.⁸

Procedurally, this Commission has the responsibility for designating ETCs in Minnesota except where it lacks jurisdiction over an applicant.⁹ The Commission evaluates an application based on the criteria of the Act, the FCC, and the state itself.¹⁰ The Commission must grant ETC status to any qualified applicant, provided that the applicant is not seeking to serve exchanges in which the incumbent telephone company is a rural telephone company.¹¹

III. Evaluation

Tekstar Communications, Inc. is a subsidiary of ASC and affiliated with at least two incumbent telephone companies, East Otter Tail Telephone Company and Twin Valley Telephone Company. The Commission has certified Tekstar to provide local facilities-based and resold services as a competitive local exchange carrier.

A. Service area

An ETC's service area is the Commission-designated geographic area for purposes of determining universal service obligations and support mechanisms.¹² Commission rules permit an ETC's service area to be as small as a single exchange, unless the ETC seeks designation in a region served by an incumbent rural telephone company.¹³

⁸ Minn. Rules part 7812.1400, subp. 2.

⁹ 47 U.S.C. § 214 (e) (6).

¹⁰ See Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999) (state may impose own criteria, in addition to federal criteria, when evaluating requests for ETC status).

¹¹ 47 U.S.C. § 214 (e) (2). In areas served by an incumbent rural telephone company, the Commission must determine whether permitting another ETC would be in the public interest. This requirement reflects Congressional concern that some thinly-populated areas might not be able to support more than one carrier. "Rural telephone company" is defined at 47 U.S.C. § 153 (47).

¹² 47 C.F.R. § 54.207.

¹³ Minn. Rules part 7812.0100, subp. 51.

Tekstar seeks ETC designation in an area consisting of the Detroit Lakes, Battle Lake, Henning, Wadena, Staples, Hawley and Mahnomen exchanges. The incumbent telephone company serving these exchanges is Qwest Corporation. Qwest Corporation does not qualify as a rural telephone company. As a result, Tekstar's proposal to serve only selected exchanges is consistent with Commission rules.

No party opposed Tekstar's proposed service area. The Commission finds Tekstar's proposal consistent with state and federal requirements for ETC designation.

B. Necessary services

Tekstar claims to be offering the designated services throughout its requested service area. The Department reviewed Tekstar's local exchange tariff and agrees that they include all the federally-required services for ETC designation. No party disputed this contention.

The Commission finds that Tekstar's service offerings are consistent with state and federal requirements for ETC designation.

C. Facilities

Federal law requires that an ETC use at least some of its own facilities to provide the designated services in its requested service area. Tekstar's 2000 annual report revealed that it provided services in at least five of the exchanges using its own facilities, and the Department supplemented this information. But the record of this proceeding is not yet sufficient to permit the Commission to conclude that this requirement is fulfilled. To ensure full compliance with this requirement, the Commission will direct Tekstar to submit a list of Tekstar facilities used to transmit or route the required services, and will refrain from granting final ETC status until it has reviewed that filing.

D. Advertising

The record of this case does not reflect Tekstar's current practice or future plans for advertising the designated services throughout its proposed service area.

A company need not begin advertising before it seeks ETC designation, because the obligation to advertise does not attach until after ETC designation has been granted.¹⁴ But to ensure full

¹⁴ See 47 U.S.C. § 214 (e) (1):

A common carrier *designated* as an eligible telecommunications carrier under paragraph (2), (3), or (6) *shall* be eligible to receive universal service support in accordance with section 254 of this title and *shall*, throughout the service area for which the designation is received –

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

compliance with the advertising requirement, the Commission will direct Tekstar to submit an advertising plan, and will refrain from granting final ETC status until it has reviewed that filing.

E. Public Interest Criteria

1. Analysis

Under state law the Commission has comprehensive authority over the provision of telecommunications services in this state. It has a specific legislative mandate to consider eight state goals as it “executes its regulatory duties with respect to telecommunications services.” Those regulatory duties would clearly include the duty to designate ETCs. The eight goals the Commission is to consider are as follows (emphasis added):¹⁵

- (1) *supporting universal service;*
- (2) *maintaining just and reasonable rates;*
- (3) encouraging economically efficient deployment of the infrastructure for higher speed telecommunications services and greater capacity for voice, video, and data transmission;
- (4) encouraging fair and reasonable competition for local exchange telephone service in a competitively neutral regulatory manner;
- (5) *maintaining or improving quality of service;*
- (6) promoting customer choice;
- (7) ensuring consumer protections are maintained in the transition to a competitive market for telecommunications service; and
- (8) encouraging voluntary resolution of issues between and among competing providers and discouraging litigation.

The Commission also has a specific legislative mandate, when issuing orders related to telecommunications matters that affect deployment of the infrastructure, to apply the goal of just and reasonable rates.¹⁶ The Commission concludes that it is authorized and bound to consider these goals in examining this application.

(B) advertise the availability of such services and the charges therefor using media of general distribution.

(emphasis added). Similarly, the FCC states:

[A] carrier must meet the section 214(e) criteria as a condition of its being designated an eligible carrier and *then* must provide the designated services to customers pursuant to the terms of section 214(e) in order to receive support....”

In the Matter of Federal-State Joint Board on Universal Service, CC Docket 96-45, Report and Order, FCC 97-157 (May 7, 1997) (emphasis in original). See also n. 2, *supra*.

¹⁵ Minn. Stat. § 237.011.

¹⁶ Minn. Stat. § 237.082.

The Act, which authorizes the Commission to make ETC designations, authorizes it to apply the public interest goals articulated in the Act in making those designations. The universal service goals of the Act include a statement that “quality services should be available at just, reasonable, and affordable rates.”¹⁷

The Act also makes it clear that state commissions bear major responsibility for ensuring that universal service rates are affordable: “The [Federal Communications] Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable.”¹⁸

2. Application

Tekstar argues that its proposal would advance the public interest by providing alternatives to consumers in the proposed service area. Tekstar also promises to offer high-speed digital subscriber line (DSL) internet access and voice mail, as well as other services that, according to Tekstar, the incumbent does not offer. More generally, Tekstar promises to provide “a basic service package that will be no more, and in many cases less, than the current cost charged by the local exchange carrier,” with enhanced reliability.

The Department argues that Tekstar’s promises, if fulfilled, would promote the public interest. But the Department notes that Tekstar did not include a tariff for more-reliable service at rates equal to or lower than those currently available in the service area. Thus the Department recommends withholding final ETC designation until after the Commission has received and reviewed Tekstar’s proposed tariff, and a service quality plan, consistent with its promises.

To ensure full compliance with the requirement that ETC designations be consistent with the public interest, convenience and necessity, the Commission will direct Tekstar to submit its proposed tariff, including at least the services required for designation, and a service quality plan. The Commission will refrain from granting final ETC status until it has reviewed those filings.

IV. Conclusion

The Commission will approve Tekstar’s application conditionally, finding that Tekstar has made a credible showing of its ability and intention to provide a high quality, affordable universal service offering throughout its proposed service area. Final approval will be granted upon Commission review and approval of a tariff filing complying with the requirements discussed in the body of this Order.

ORDER

1. The Commission grants conditional approval of Tekstar’s application for designation as an eligible telecommunications carrier. Final approval is contingent upon Commission review and approval of the compliance filing set forth in paragraph 2.
2. Tekstar shall make a compliance filing including the following items:

¹⁷ 47 U.S. C. § 254 (b) (1).

¹⁸ 47 U.S.C. § 254 (i).

(a) proposed tariffs containing the proposed rates for the services listed at 47 C.F.R. § 54.101(a),

(b) a list of facilities used in the transmission or routing of the required services,

(c) a plan for advertising its universal service offering(s) throughout its proposed service area in accordance with 47 U.S.C. § 214, and

(d) a service quality plan consistent with Tekstar's claims to provide high quality service.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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